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No. 83-_____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

EDWIN P. KRIEGESMANN
Petitioner

vs.

BARRY-WEHMILLER COMPANY
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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29 pp

QUESTIONS PRESENTED

. Did the Court of Appeals for the Eighth Circuit err in barring Petitioner's age discrimination claim because Petitioner allegedly filed his initial complaint with the EEOC more than 180 days after his termination when material issues of fact existed as to the equitable tolling of the 180-day limit including the failure of Respondent to post statutory notices and procedures were employed by Respondent designed to cause Petitioner to waive his rights.

PARTIES TO THE ACTION

Petitioner, Edwin P. Kriegesmann, is an individual residing in the State of Missouri previously employed by Respondent, Barry-Wehmiller Company, which is a Missouri Corporation.

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IN THE
SUPREME COURT OF THE UNITED STATES
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No. _____

EDWIN P. KRIEGESMANN
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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Edwin P. Kriegesmann petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. The opinion is reprinted as Appendix A in the separate appendix attached to this Petition. The opinion of the District

Court is not yet reported. It is reprinted as Appendix B in the separate appendix attached to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on July 19, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

This case involves a summary judgment entered against Petitioner on his age discrimination claim brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. Section 621, et seq. The District Court granted summary judgment in favor of Respondent Barry-Wehmiller Company on the grounds that Kriegesmann had filed his administrative complaint with the EEOC more than 180 days after Petitioner's termination and was thus barred from pursuing his claim pursuant to 29 U.S.C. Section 626(d). The Court of Appeals for the Eighth Circuit in a

per curium opinion affirmed the judgment of the District Court.

This action was filed on behalf of Petitioner Kriegesmann based on his complaint that he had been terminated from his employment by Respondent Barry-Wehmiller Company on January 22, 1982. At the time of his dismissal, Petitioner was 56 years of age. In his complaint Petitioner alleged that his age played a substantial part in Barry-Wehmiller's decision to terminate him.

Petitioner was born July 12, 1925 with his highest level of education consisting of two years in high school. See, Plaintiff's deposition transcript, hereinafter referred to as "(T.__)," at page 8. Kriegesmann began his employment with Barry-Wehmiller in April, 1961 and gradually rose through the company ranks to become its tooling superintendent for the company's manufacturing facility (T.17).

On January 22, 1982 Petitioner was called to his supervisor's office where he was

terminated from his employment allegedly because the company was eliminating his position. (T.49-51).

Approximately one week later, Petitioner was called to Respondent's personnel office where he met with the personnel director, Borchelt, who informed Petitioner that he was eligible for twenty-one weeks of termination pay and four weeks of accrued vacation pay. Petitioner was further informed that he could accept these benefits in weekly installments and still receive his hospitalization and insurance benefits provided by Barry-Wehmiller Company. At that time, he was affirmatively encouraged by Borchelt to receive the benefits in weekly installments for a twenty-five-week period. (T. 55-57).

In addition to affirmatively encouraging Kriegesmann to take his benefits in weekly installments, Borchelt promised to assist Kriegesmann in finding other employment. Within a few days of Kriegesmann's and

Borchelt's meeting, Borchelt suggested the name of at least one company to Petitioner as a prospect for employment. (T.65).

On October 21, 1982, 272 days from the date of Kriegesmann termination on January 22, 1982, and 97 days from the date of the expiration of his severance benefits, Petitioner filed his complaint of age discrimination with the Equal Employment Opportunity Commission. After unsuccessful attempts to conciliate the complaint, Petitioner filed his complaint in the United States District Court of the Eastern District of Missouri on July 11, 1983.

On November 16, 1983, Respondent filed its Motion for Summary Judgment on the grounds that Petitioner Kriegesmann had failed to file his complaint of age discrimination within 180 days from the date of his termination on January 22, 1982. Both the District Court and the Eighth Circuit sustained Respondent Barry-Wehmiller's position granting summary judgment

on the grounds that Petitioner had not timely filed his administrative complaint with the EEOC. This Petition followed seeking relief from the summary judgment entered against Petitioner.

REASON FOR GRANTING THE WRIT

ARGUMENT

Rule 17 of this Court provides that a Writ of Certiorari may be granted where the decision of the lower court is in conflict with other decisions of the federal courts of appeals and where the lower court has sanctioned a departure from accepted procedures requiring a Writ of Certiorari to issue in order to correct the deficiencies. Both of these circumstances obtain in the instant case.

The District Court erroneously granted summary judgment in favor of Respondent in spite of material issues of fact being presented to the Court during its consideration of the Motion for Summary

Judgment. The particular facts presented in this case demonstrate that Respondent took affirmative steps to "lull" Petitioner into waiting beyond the 180 days from his date of termination before he filed his complaint of age discrimination with the EEOC. Thus, equitable tolling of the 180-day limitation contained in 19 U.S.C. Section 626(d) was demonstrated, or, at the very least, a material issue of fact was present as to the issue of equitable tolling.

Title 29 U.S.C. Section 626(d) provides in part that:

> "No civil action may be commenced by any individual under this section until the individual has given the secretary not less than 60 days notice of an intent to file such action. Such notice shall be filed:
>
> 1. Within 180 days after the alleged unlawful practice occurred."

It is established in the courts of appeals that the 180 day limitation is similar to a Statute of Limitations and is subject to equitable tolling. See, Nielsen v. Western

Electric Co., 603 F.2d 741 (8th Cir. 1979); Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976).

Other courts have noted that summary judgment under Rule 56 is inappropriate on the issue of timely filing of EEOC notices in age discrimination cases where there is a material issue of fact regarding the issue of equitable tolling. See , Aronsen v. Crown-Zellerbach, 662 F.2d 584 (9th Cir. 1981); cert denied 103 S.Ct. 1183. In Aronsen the court noted that: "On review of a grant of summary judment, it must appear that the facts as alleged could not reasonably be construed as being equitable estoppel or tolling." In Aronsen, the facts were similar to the instant case where the court noted that:

> "Aronsen offers the inferred fact that he was inhibited from filing notice with the ADEA for fear of losing his "terminal year" severance pay, losing his eligibility for early retirement, and losing company aid in finding other work. Whether this inhibition was reasonable under the circumstances and whether it was the result of a plan that would intentionally or foreseeably lull grievance

> and delay ADEA filings are factual questions pertinent to the equitable estoppel issue that are improper for summary judgment treatment. The facts could support an estoppel argument." See, Arsonsen, at p.595.

Thus, both the decisions of the District Court and the Court of Appeals for the Eighth Circuit are in conflict with Aronsen in that a material issue of fact was present as to whether Petitioner's belief that he would lose his severance pay, insurance benefits, and employment referrals legitimately deterred him from timely filing his ADEA complaint. Summary judgment under Rule 56 was inappropriate under the circumstances.

Finally, this issue of adequate notice was before the Trial Court and the Court of Appeals in deciding adversely to Petitioner. The Court of Appeals indicated that the issue of the adequacy of notice was not presented at the Trial Court and therefore could not be a basis for reversal. However, in granting summary judgment pursuant to Rule 56, there must not be any material issue of fact left to

be resolved. This issue of notice was raised in the original Motion for Summary Judgment by Respondent when it claimed that the notice was posted. However, the issue as to the adequacy of the notice was never resolved by the Trial Court and could not be because there was no evidence in the record pertaining to the adequacy of such notice. Therefore, the Trial Court and the Court of Appeals erroneously granted summary judgment when a material issue of fact as to the adequacy of Respondent's notice remains unresolved. See, Kephart v. Institute of Gas Technology, 581 F.2d 1287 (7th Cir. 1978).

CONCLUSION

For the above stated reasons, it is respectfully requested that a Writ of Certiorari issue for the United States Court of Appeals for the Eighth Circuit.

RUPPERT AND BENJAMIN

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CERTIFICATE OF SERVICE:

A copy of the foregoing has been served upon Mr. Gerald M. Richardson, Attorney for Respondent, 1800 Equitable Building, 10 South Broadway, St. Louis, Missouri 63102, by depositing same in regular U.S. Mails, postage prepaid, this 24 day of September 1984.

Cyn Oldham

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1215

Edwin P. Kriegesmann, Appellant, v. Barry-Wehmiller Company Appellee.	* * * * * * * *	Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: June 20, 1984

Filed: July 19, 1984

Before HEANEY, Circuit Judge, HENLEY, Senior Circuit Judge, and ARNOLD, Circuit Judge

---

PER CURIAM.

Edwin P. Kriegesmann appeals from the district court's[1] grant of summary judgment and dismissal of his age discrimination action under the Age Discrimination in Employment Act

---

[1]The Honorable Stephen N. Limbaugh, United States District Judge for the Eastern and Western Districts of Missouri.

(ADEA), 29 U.S.C. Sections 621-634, against the Barry-Wehmiller Company (the employer). For reversal appellant argues that the district court erred in holding that his action was untimely because the employer's actions did not equitably toll the time for filing a charge with the Equal Employment Opportunity Commission (EEOC). For the reasons discussed below, we affirm.

Appellant began working for the employer in 1961 and was eventually promoted to the position of tooling superintendent for the employer's manufacturing facility. On January 22, 1982, appellant's supervisor notified him that his job was terminated effective immediately. He was told to clean out his desk and leave that day. The Personnel Director met with appellant one week later to discuss severance pay. Appellant was eligible for twenty-one weeks of termination pay and four weeks of accrued vacation pay, which he could elect to receive in a lump-sum or over a

twenty-five week period. If appellant chose to receive the payments in weekly installments, his health and insurance benefits would continue for as long as he received payments. Those benefits would terminate immediately if he received a lump-sum payment. Appellant chose to receive the payments in weekly installments. The Personnel Dirctor later offered to assist appellant in finding other employment and recommended the name of at least one other company where he could apply. Appellant received severance and vacation pay through July 30, 1982. On October 21, 1982, he filed his age discrimination charge with EEOC, 272 days after his termination on January 22, 1982. Appellant claimed that he was fired solely on the basis of his age and younger employees were promoted to take his place.

After unsuccessful attempts to conciliate appellant's EEOC charge, he filed the present action in federal district court. The

employer moved for summary judgment on the ground that appellant's action was untimely because he had not filed a charge of unlawful discrimination with the EEOC within 180 days of the alleged unlawful termination, as required by 29 U.S.C. Section 626(d).[2] Appellant responded that the time for filing the EEOC charge did not begin to run until the severance benefits ended because the employer's actions constituted a continuing violation. Moreover, appellant argues that

---

[2]29 U.S.C. Section 626(d) 'provides in pertinent part:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Commission. Such a charge shall be filed--
>
> (1) within 180 days after the alleged unlawful practice occurred;
>
> . . . .
>
> Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

the employer's actions justified equitable tolling of the 180-day limitations period. In support of this contention, appellant stated that the employer would have cut off his severance benefits in retaliation if he had filed an age discrimiantion charge with the EEOC; the employer had misrepresented the reasons for discharging appellant; the employer promised him future employment; and the employer was not prejudiced by the delay in filing. The district court rejected these arguments and granted the employer's motion for summary judgment.

The appellant maintains that the district court erred as a matter of law in granting summary judgment. First, appellant alleges that the employer's failure to post a notice of his rights under the ADEA violated 29 U.S.C. Section 627 and justified equitable tolling of the 180-day filing period. Appellant did not present this theory to the trial court, and we will not consider it for

the first time on appeal. See 10 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure Section 2716 at 650-54 (1983).

Second, appellant claims that by extending the severance benefits over a twenty-five week period and offering to help him find other employment, the employer lulled him into sleeping on his rights. As indicated, appellant argues that if he had filed a discrimination charge with EEOC, the employer may have retaliated by cutting his severance benefits or sabotaging his efforts to find a new job. Appellant denominates these actions "constructive misrepresentation." We agree with the Fourth Circuit that, as a matter of law,

> the attempt to mitigate the harshness of a decision terminating an employee, without more, cannot give rise to an equitable estoppel. The statute of limitations will not be tolled on the basis of equitable estoppel unless the employee's failure to file in timely fashion is the consequence either of a deliberate design by the employer or of actions that the employer should

unmistakably have understood would cause the employee to delay filing his charge.

Price v. Litton Business Systems, Inc., 694 F.2d, 965 (4th Cir. 1982) (footnote and citation omitted). The employer's actions asserted in the present case -- the provision of severance benefits and job referrals -- were not likely to mislead appellant into sleeping on his rights. The undisputed facts reveal no deliberate conduct on the part of the employer to lull appellant into delaying the filing of his ADEA charge.

Finally, appellant argues that the late filing of his charge would not prejudice the employer. The ADEA's 180-day filing requirement is in the nature of a statue of limitations and subject to equitable tolling. See Hrzenak v. White Westhinghouse Appliance Co., 682 F.2d 714, 717 n.6 (8th Cir. 1982). The absence of prejudice to an opponent does not support invocation of the doctrine of equitable tolling. Equitable tolling arises upon some poistive misconduct by the party

against whom it is asserted. As discussed above, the undisputed facts reveal no such misconduct by the employer. Because the undisputed facts disclosed on the record reveal that as a matter of law equitable estoppel could not apply, summary judgment for the employer was appropriate.

Accordingly, the judgment of the district court is affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eight Circuit.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

EDWIN P. KRIEGESMANN, Plaintiff,	)	
vs.,	)	No. 83-1651 C (5)
BARRY-WEHMILLER COMPANY Defendant.	)	

JUDGMENT

This matter having come before the Court, the Honorable Stephen N. Limbaugh, District Judge, presiding, on the defendant's motion for summary judgment, and said motion having been granted as set forth in the Memorandum and Order dated January 12, 1984,

IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff take nothing by his cause of action, that the action be dismissed on the merits, and that the defendant recover of the plaintiff cost of the action.

Dated this 12th day of January, 1984.

s/ Stephen N. Limbaugh
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

EDWIN P. KRIEGESMANN,	)	
	)	
Plaintiff,	)	
	)	
vs.,	)	No. 83-1651 C (5)
	)	
BARRY-WEHMILLER COMPANY	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

The matter before the court is the defendant's motion for summary judgment, which will be granted. The plaintiff has responded.

The plaintiff is suing his former employer for discharging him in violation of the Age Discrimination in Employment Act, 29 USC Section 621 et seq. The ground for the motion is that the plaintiff did not file a charge of discrimination with the Equal Employment Opportunity Commission within 180 days of the alleged unlawful employment practice as required under 29 USC Section 626(d).

It is undisputed that the plaintiff was told his position was terminated on January

22, 1982; that he was told to clean out his desk and leave that day; that his last day at work was January 22; that he received severance and vacation pay through July 30, 1982; and that the filed his charge with EEOC on October 21, 1982, more than 180 days after January 22.

The plaintiff argues that his cause of action accrued on July 30, 1982, when the severance and vacation pay ended, but this contention is incorrect. The 180-day period began running January 22, which is when the plaintiff was told his job was terminated and that he should leave and when he stopped working. The subsequent termination of severance pay was merely a consequence of a prior alleged discriminatory act, the termination on January 22. Price v. Litton Business Systems, 694 F.2d 963 (4th Cir. 1982); Lawson v.Burlington Industries, Inc., 683 F.2d 862 (4th Cir. 1982); cf. Delaware

State College v. Ricks, 440 U.S. 250 (1980)(Title VII case).

The next issue is whether the plaintiff has justified equitable tolling of the 180-day limitations period by showing improper conduct on the part of the defendant. See Price, supra.; Neilsen v. Western Electric Co. 603 F.2d 741 (8th Cir. 1979). The plaintiff set forth four reasons for equitable tolling.

First, the plaintiff's attorneys argue that the plaintiff would have been subject to a retalitory cut-off of severance pay if he had filed a charge. The plaintiff, however, has adduced no evidence that such retaliation would have occurred or even that the plaintiff delayed filing because he feared retaliation. Furthermore, mere fear of retaliation alone would be insufficient, as improper conduct on the part of the defendant must be shown.

Next, the plaintiff argues that the defendant misrepresented the reasons for the plaintiff's discharge. The plaintiff has

presented no evidence that the alleged misrepresentations caused the delay in filing.

Third, the plaintiff claims that the defendant promised him future employment. As evidence, the plaintiff refers to Pl. Ex. A, a letter from the defendant which referred to the termination as a layoff and which indicated that the plaintiff might be called back. The letter, however, is dated August 12, 1982, more than 180 days after January 22. Any act of the defendant after the 180-day period ended does not justify tolling, as it could not have caused the delay in filing. The plaintiff also stated at his deposition that he knew he was terminated on January 22, and that he applied for work elsewhere after that date.

Finally, the plaintiff argues that the defendant was not prejudiced by the delay in filing. Assuming this is true, the arugment fails because tolling requires improper conduct on the part of the defendant and a

statute of limitations cannot be set aside merely because the defendant is not prejudiced.

The plaintiff has not argued that the defendant concealed his rights under the Age Discrimination Act. He had seen an EEOC poster relating to age discrimination which had been posted, and he threatened to sue the defendant (by which he meant suit under the ADEA) when he was told of his dismissal on January 22. Dep. at 54 111-12. The Court also notes that the plaintiff has not even submitted an affidavit explaining why he delayed filing.

There being no genuine issue of material fact,

IT IS HEREBY ORDERED that the defendant's motion for summary judgment be and is GRANTED.

Dated this 12th day of January, 1984.

s/ Stephen N. Limbaugh
United States District Judge

Supreme Court, U.S.
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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Did the Eight Circuit err by affirming summary judgment against Petitioner where the record, void of any issue of material fact, established that the Petitioner, despite active knowledge of his ADEA rights on the date Respondent informed Petitioner of his dismissal and relieved him of his duties, filed his notice of intent to sue after the expiration of the 180 day statutory filing period?

PARTIES TO THE ACTION

Petitioner, Edwin P. Kriegesmann, is an individual residing in the State of Missouri. Respondent, Barry-Wehmiller Company, is a Missouri corporation. It has no parent company, partly owned subsidiaries or affiliates.

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Relevant Statutory Provisions

29 U.S.C. §626 (d)(1) (1982):

> No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty (60) days notice of an intent to file such action. Such notice shall be filed --
>
> (1) Within one hundred eighty (180) days after the alleged unlawful practice occurred.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Appeals and of the District Court have not yet been reported. Petitioner has included copies of them as Appendix A and B to his petition.

STATEMENT OF THE CASE

This case involves a summary judgment entered against Petitioner. Edwin P. Kriegesmann ("Petitioner" or "Kriegesmann"), on his age discrimination claim brought under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621-634 (1982). On January 12, 1984, the District Court granted the motion for summary judgment of Respondent Barry-Wehmiller Company ("Respondent" or "Company") on the grounds that Kriegesmann had failed to file notice of intent to sue within one hundred eighty (180) days of the allegedly discriminatory act, as required under the ADEA. In a per curium opinion, the Court of Appeals for the Eighth Circuit affirmed the District Court's judgment.

Petitioner began his employment for the Company in April, 1961. (Tr. 15-16.)[1/] During his employment, he performed a variety of jobs. (Tr. 16-41.) Between 1980 and 1982, a reduction in the Company's work force occurred. (Tr. 54-55.) On January 22, 1982, Kriegesmann's supervisor informed Kriegesmann of his dismissal because of the Company's elimination of Petitioner's job. (Tr. 53.) When so informed, Kriegesmann threatened to sue the Company. In his deposition, Petitioner admitted that at the time of his discharge, he knew of his rights

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1/ As used in this Brief, "Tr." followed by a number means Petitioner's deposition at the page of the number referenced. This brief includes the relevant portions of Kriegesmann's deposition transcript referenced in this brief as an attachment entitled Appendix One.

under ADEA, and that he intended to sue the Company under its provisions. (Tr. 53-54.) Kriegesmann further admitted that he had seen the "EEOC poster relating to age discrimination" posted at the Company. (Tr. 111-112.)

Approximately one week after his discharge, Petitioner met with Company's personnel director concerning his severance pay. The personnel director told Kriegesmann that the Company would pay him severance pay equal to twenty-seven (27) weeks of compensation. This represented one (1) week's severance pay for each of Petitioner's twenty-one (21) years of employment with the Company, four (4) weeks accrued vacation pay and two (2) weeks for the current pay period. The personnel director offered Kriegesmann the option of taking his

severance pay either in a single lump sum or in monthly installments over the next six (6) months. He recommended that Petitioner elect to receive his severance pay in monthly installments. The personnel director explained that he based his recommendation on the Company's policy of continuing its health and insurance benefits for as long as a former employee receives severance payments. The personnel director further informed Kriegesmann that, if Petitioner took his severance pay as a lump sum, his health and insurance benefits would end when he received the lump sum. Petitioner chose to accept his severance pay in monthly installments. (Tr. 55-57.)

The Company's personnel director met with Petitioner on one occasion later in January, 1982 for the purpose of offering

to assist Kriegesmann find a job. (Tr. 65.) He turned up one lead that did not result in a job for Petitioner. (Tr. 66.) In August, 1982, Kriegesmann found employment on his own with another St. Louis company. (Tr. 128-129 and 114.)

Petitioner's severance benefits ran out in late July, 1982. On October 21, 1982, two hundred and seventy-two (272) days after his termination, Kriegesmann filed notice of his intent to sue with the Equal Employment Opportunity Commission ("EEOC"). On July 11, 1983, Petitioner filed suit against the Company. The Company moved for summary judgment on November 16, 1983 on the grounds that Kriegesmann had not filed notice of intent to sue within the statutory time limit of one hundred eighty (180) days. On January 12, 1984,

the District Court granted the Company's motion and entered summary judgment in its favor. On July 19, 1984, the Eighth Circuit affirmed. Petitioner filed his Petition for a writ of certiorari to this Court on September 17, 1984. Respondent respectfully submits its brief in opposition to this Petition.

ARGUMENT

I. SINCE THE COMPANY ENGAGED IN NO MISLEADING, FRAUDULENT, OR DECEPTIVE CONDUCT DESIGNED TO LULL KRIEGESMANN INTO ABANDONING HIS ADEA RIGHTS, THE EIGHTH CIRCUIT RULED CONSISTENTLY WITH THE DECISIONS OF OTHER CIRCUITS BY AFFIRMING SUMMARY JUDGMENT AGAINST KRIEGESMANN, BECAUSE HE HAD FILED HIS NOTICE OF INTENT TO SUE MORE THAN 180 DAYS AFTER HE HAD FIRST KNOWN OF THE ALLEGEDLY DISCRIMINATORY ACT.

Neither the decision of the District Court, nor that of the Eighth Circuit in this case conflicts with any other

Circuit Court decision concerning equitable tolling of the statutory time limit for filing a complaint under the ADEA. At no time, furthermore, did either of these courts depart from the usual course of judicial proceedings. Hence, no writ of certiorari should issue.

Courts have recognized that the ADEA's mandatory one hundred eighty (180) day period for filing notice of intent to sue resembles a statute of limitations and so is subject to equitable tolling. Price v. Litton Business Systems, Inc., 694 F.2d 963, 965 (4th Cir. 1982); Hrzenak v. White-Westinghouse Appliance Co., 682 F.2d 714, 717-18 (8th Cir. 1982); Nielsen v. Western Elec. Co., Inc., 603 F.2d 741, 743-44 (8th Cir. 1979). The judicial decisions which have addressed the issue of equitable tolling

have established that only where the employer has engaged in "misleading, fraudulent or deceptive conduct," Smith v. American President Lines, Ltd., 571 F.2d 102, 111 (2d Cir. 1978), or has failed to provide adequate notice of ADEA rights do the circumstances justify tolling. Posey v. Skyline Corp., 702 F.2d 102, 105-06 (7th Cir. 1983). See Nielsen v. Western Elec. Co., Inc., 603 F.2d at 743. The uncontroverted evidence before the trial court established, by Petitioner's own admissions, a complete lack of justification for equitable tolling.

At no time did Respondent engage in conduct designed to mislead or "lull" Petitioner into not pursuing his ADEA rights. Petitioner's deposition testimony demonstrates that he himself decided

to take his severance pay in monthly payments as opposed to one lump sum payment. The Company's efforts to ease the trauma of termination, by offering assistance in finding a new job and by recommending a severance payment schedule which allowed the Petitioner to continue health and insurance coverage, cannot be construed as fraudulent or misleading conduct. "[A]s a matter of law . . . the attempt to mitigate the harshness of a decision terminating an employee, without more, cannot give rise to an equitable estoppel." Price v. Litton Business Systems, 694 F.2d at 965. In addition, the legal precedents on the issue have uniformly determined that payment of severance benefits do not extend the time period for filing notice of intent to sue. See Lawson v. Burlington

Industries, Inc., 683 F.2d 862, 864 (4th Cir.), cert. denied, 459 U.S. 944 (1982).

II. THE EIGHTH CIRCUIT'S DECISION IN THIS CASE DOES NOT CONFLICT WITH THE NINTH CIRCUIT'S ARONSEN DECISION, BECAUSE THE TWO DECISIONS INVOLVED DISSIMILAR OPERATIVE FACTS.

Petitioner argues that the Eighth Circuit's decision in this case conflicts with the Ninth Circuit's decision in Aronsen v. Crown-Zellerbach, 662 F.2d 584 (9th Cir. 1981), cert. denied, 459 U.S. 1200. Aronsen, however, like the case at bar, is consistent with existing authority. Both cases provide that summary judgment may properly dispose of an equitable tolling issue. In fact, the Ninth Circuit specifically stated as follows: "On review of a grant of summary judgment, it must appear that the facts as alleged could not reasonably be construed

as permitting equitable estoppel or tolling." Aronsen v. Crown-Zellerbach, id. at 595. The two cases have divergent results not because the law as interpreted or applied differs, but because the factual foundations of the two cases have distinct differences.

The Company terminated Kriegesmann's employment on January 27, 1982. His supervisor told him to clean out his desk and vacate his office that day. (Tr. 51.) He received only the severance pay to which he was entitled under established company policy. (Tr. 56.)

In Aronsen, on the other hand, the employer informed the plaintiff of his termination one year before being required to vacate his office. During the one year "transition period", in addition to remaining on the payroll at his normal

salary, the plaintiff retained all "the perquisites of his position: office, secretary, travel and expense account." Aronsen v. Crown-Zellerbach, 662 F.2d at 586. In addition, he performed at least one job for Crown-Zellerbach during the year, and accepted other work that year only after receiving permission to do so from a company vice-president. Id. Thus, the plaintiff clearly had a continuing relationship with his employer after he had received notice of his termination. Consequently, he had a reasonable reluctance to file an ADEA claim, for fear of jeopardizing that relationship. Kriegesmann, however, lacked any continuing relationship with his employer after his dismissal. Therefore, Petitioner's reliance on Aronsen is misplaced.

III. ALTHOUGH KRIEGESMANN HAS WAIVED THE ISSUE OF ADEQUATE NOTICE BY NOT RAISING IT BEFORE THE DISTRICT COURT, THE RECORD CLEARLY ESTABLISHED BOTH THE COMPANY'S POSTING OF THE EEOC'S NOTICE CONCERNING ADEA RIGHTS AND PETITIONER'S ACTUAL KNOWLEDGE OF HIS RIGHTS ON THE DATE THAT HE FIRST LEARNED OF HIS TERMINATION.

Peitioner did not raise the issue of adequate notice before the trial court. An appellate court, in reviewing a summary judgment, "can consider only those papers that were before the trial court. The parties cannot . . . advance new theories or raise new issues in order to secure a reversal of the lower court determination." 10 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure at 650-54 (1983); see also Penton v. Crown-Zellerbach Corp., 699 F.2d 737, 741 (5th Cir. 1983); Tarpely v. Greene, 684 F.2d 17 n.17 (D.C. Cir. 1982). Hence, the Eighth Circuit followed established

judicial procedure when it refused to hear the issue of adequate notice on appeal.

Even if Petitioner could properly raise this issue, the trial court correctly granted summary judgment. Generally, an employer's failure to post an EEOC notice of ADEA rights will toll the 180 day filing period. Kephart v. Institute of Gas Technology, 581 F.2d 1287 (7th Cir. 1978). The filing period, however, begins to run whether or not notice is posted, if the employee acquires actual knowledge of his rights under the ADEA. Id. at 1289; Edwards v. Kaiser Aluminum & Chemical Sales, Inc., 515 F.2d 1195, 1198 (5th Cir. 1975). The District Court had uncontroverted evidence before it that established not only that Petitioner had seen "the EEOC

poster relating to age discrimination" at work, (Tr. 111-12), but also that at the time of his termina- tion Kriegesmann knew of his ADEA rights and intended to sue under its provi- sions. Kriegesmann described the extent of his knowledge of his ADEA rights on the date that he learned of his termina- tion as follows:

> Q. For the record, would you please state for me one more time what specifically was said at that January 22nd, 1982 meeting?
>
> A. I was told to follow them into the office. I went with them, and Mr. Swailes says, "We have made a hard decision. We're going to eliminate your job," and I replied back, "Why wasn't I offered any of the other jobs." Neither one answered me, and I said, "I'll evidently sue the company."
>
> Q. Did you tell them what you were going to sue the company for?
>
> A. No, sir, just made that statement.

Q. On what basis did you plan to sue the company when you made that comment on January 22, 1982?

A. Because I knew they would have to put somebody else in my job, otherwise they couldn't produce stuff. It wasn't a total elimination of my job. That's why I told them I would sue them under the EEOC. I just told them I would sue them.

Q. You said under the EEOC, meaning?

A. That's where I was going to go, under the Age Discrimination Act.

(Tr. 53-54). Thus, Plaintiff understood that his employment had terminated on January 22, 1982. He, moreover, believed that his termination violated the ADEA. Lastly, he knew that he needed to go to the EEOC to start his lawsuit. By his own testimony, Plaintiff established his actual knowledge of all the critical factors necessary for him to pursue his claim under the ADEA on January 22, 1982.

Finally, existing precedent consistently holds that the one hundred eighty (180) day statutory filing period begins to run when the employee first learns of the allegedly unlawful act, not when he feels its harmful effects. Price v. Litton Business Systems, Inc., 694 F.2d at 965; Lawson v. Burlington Industries, Inc., 683 F.2d at 863-64; Naton v. Bank of California, 649 F.2d 691, 695 (9th Cir. 1981); Bonheim v. Dresser Industries, Inc., 569 F.2d 187 (3rd Cir. 1977), cert. denied, 439 U.S. 821 (1978); see also Delaware State College v. Ricks, 449 U.S. 250, 258 (1980) (Title VII case). Basically, Kriegesmann urges that the mere receipt of benefits from an employer after the employee has actual knowledge of the allegedly discriminatory act should extend the beginning of the

filing period for as long as the employee receives the benefits. By accepting Petitioner's position, this Court would create an exception which would devour the rule. The application of equitable tolling to Kriegesmann's claim would defy Congress' legislative determination that plaintiffs must provide notice of their intent to sue under the ADEA "[w]ithin one hundred eighty (180) days after the alleged unlawful practice occurred." See 29 U.S.C. §626(d)(1). For this reason, affirmative misconduct or deceit on the part of the employer must serve as a pre-condition to the application of the equitable tolling doctrine. An employee wrongfully mislead about his ADEA rights or his future employment by his employer

deserves the benefit of equitable tolling. An employee, however, who has knowingly slept on his ADEA rights in the absence of employer misconduct, such as Kriegesmann, merits no tolling of the limitation period. If any wrong has occurred, Petitioner caused it by his own neglect.

CONCLUSION

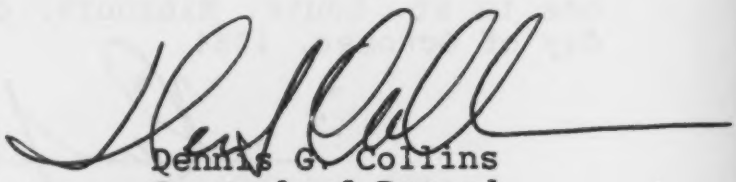
In brief, Kriegesmann asks this Court to reverse the Eighth Circuit not on the basis of any conflict among the circuit courts of appeal, procedural irregularity, or important question of federal law but because of factual circumstances beneficial to him. As previously discussed, no existing legal precedent furnishes any support for Petitioner's position. Kriegesmann personally chose

to receive his severance pay in periodic installments rather than as a lump sum. In so doing, he extended his health and insurance benefits for an additional six (6) months. Similarly, the Company's efforts to help Kriegesmann find new employment created no continuing relationship between Petitioner and the Company. Circuit courts of appeal which have considered issues similar to the one presented by Kriegesmann's Petition have unanimously refused to toll the filing period under the ADEA. Thus, Kriegesmann's petition lacks any basis for this Court to grant a writ of certiorari.

In addition, the Eighth Circuit correctly denied Kriegesmann's request that it reverse the District Court, because he lacked adequate notice of his

claim at the time of his termination. Since Petitioner never raised this issue to the trial court, he cannot pursue it on appeal. The record before the District Court, moreover, completely resolved this issue against Kriegesmann by his own admissions. Petitioner had actual knowledge of his ADEA claim against the Company on the day that he learned of his termination. He had previously seen a sign posted on a Company bulletin board which explained his rights under the ADEA. In addition, when his supervisor informed Kriegesmann of his termination, he replied, "I'll evidently sue the [C]ompany," (Tr. 53), meaning that he intended to exercise his rights under the ADEA. Therefore, Kriegesmann had actual knowledge of his ADEA rights and his alleged ADEA claim

against the Company on the date that he learned of his termina- tion. As such, Petitioner's petition to this Court provides no basis upon which to grant a writ of certiorari as to the issue of adequate notice. Accordingly, the Company respectfully requests that no writ of certiorari issue for the United States Court of Appeals for the Eighth Circuit.



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Dated: October 19, 1984

STATE OF MISSOURI)
) ss.
CITY OF ST. LOUIS)

CERTIFICATE OF FILING BY MAIL

The undersigned counsel of record and a member of the Bar of the Supreme Court of the United States, certifies that the original and forty copies of the foregoing instrument was filed in the Supreme Court of the United States by depositing same in an envelope addressed to the clerk of such court with first class postage fully prepaid and by depositing said envelope in a U. S. Post Office mail box in St. Louis, Missouri, on the 22nd day of October, 1984.

Subscribed and sworn to personally before me this 22nd day of October, 1984.

DEBRA J. SPAETHE
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES 11/27/87
ST. LOUIS COUNTY

Notary Public

CERTIFICATE OF SERVICE

The undersigned certifies that three copies of the foregoing instrument was served upon Francis L. Ruppert, Ruppert and Benjamin, Attorney for Petitioner and Counsel of Record, 8000 Bonhomme, Suite

201, Clayton, Missouri 63105, with postage fully prepaid and by depositing said envelope in a U. S. Post Office mail box in St. Louis, Missouri, on the 22nd day of October, 1984.